72-1650

Supreme Court, U. S.
FILED
JUN 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CONCERNED PARENTS ASSOCIATION ET AL

72-1650 *Petitioners*

vs.

ELBERT D. BROOKS, DIRECTOR OF SCHOOLS, AND C. R. DORRIER, L. C. GIBBS, I. T. CRESWELL, W. J. HARBISON, MRS. IRWIN ESKIND, WALDEN S. FABRY, MRS. C. F. MAGER, FRANK T. GRISHAM, AND W. W. BERRY, MEMBERS OF THE BOARD OF EDUCATION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James Patrick Nichol
Ingraham, Nichol, Young & Corbett
1720 Parkway Towers
Nashville, Tennessee 37219

Attorney for the Petitioners,
Concerned Parents Association et al

INDEX

Opinions below	3
Jurisdiction	4
Questions Presented	4
Constitutional Provisions	4
Statement of Case	5
Argument	8
Conclusion	17

Appendix: (by authority of rule 46 see appendix in companion case, Kershaw vs. Respondents which is concurrently before the court).

Order and Opinion of the United States District Court for the Middle District of Tennessee	13
Order of the United States Court of Appeals	22

TABLE OF AUTHORITIES

Cases:

Atlantic Coast Railroad Company v. Brotherhood of Locomotive Engineers, 398 USC 281, 90 SCT 1739 and 26 L.Ed. 234 (1970)	12
In re: Baxter, Fed., Cap. No. 1, 118 5 AM Law Reg. N.S., 159, notes	9
Bledsoe v. Wright, 61 Tenn. 471 (1873)	13
Cody v. Roane, 105 Tenn. 515 (1900)	15
Cottman v. Daily, 94 F.2d 85 (4th Cir. 1958)	16

Grannis v. Ordean, 234 US 385 (1914) 16

Gibson's Suits in Chancery, Section 44, Page 55 14

Kelley v. Metropolitan Board of Education, 463 F.2d 732 (6th Cir., 1972) 5, 8, 10, 15-16

Millekin v. Meyer, 311 US 457 (1940) 16

Preston v. Duncan, 148 SW 229, 126 Tenn. 106 (1912) 13

Ridley v. Halliday, 106 Tenn. 697 (1901) 15

Roller v. Holly, 176 US 398 (1900) 16

Shane v. Northwest Industries, Inc., 49 FRD 46 3B, Moore's Federal Practice, Paragraph 23, Section 10-1, Page 2762 16

Constitutional Provisions

United States Constitution
Fifth Amendment 4, 10
Ninth Amendment 5, 10, 17

Constitution of State of Tennessee
Article I, Section II 13
Article II, Section XVII 13

Statues.

28 USC 1254 (1) 4
28 USC 2283 4, 11, 12
16 TCA 610 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CONCERNED PARENTS ASSOCIATION ET AL

Petitioners

vs.

ELBERT D. BROOKS, DIRECTOR OF SCHOOLS, AND C.R. DORRIER, L. C. GIBBS, I. T. CRESWELL, W. J. HARBISON, MRS. IRWIN ESKIND, WALDEN S. FABRY, MRS. C. F. MAGER, FRANK T. GRISHAM, AND W. W. BERRY, MEMBERS OF THE BOARD OF EDUCATION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Sixth Circuit Court of Appeals entered in the above styled case on February 14, 1973.

Opinion Below

There was no opinion of the United States Court of Appeals for the Sixth Circuit either published or unpublished. The Clerk

of the Court entered an order for the Court. Said order is set out on page 22 of the Appendix hereto.

Jurisdiction

The Clerk's order was entered February 14, 1973, thus, this petition is timely filed. The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1) and Rule 19 of the Supreme Court Rules.

Questions Presented

Whether or not parents of children in a school district can be enjoined from prosecuting a suit in the State Court of Tennessee by a United States District Court, on its own motion, after making the attorney representing the parents an additional party defendant to a "motion for temporary restraining order" filed before said United States District Court by the Director of such school district under the provisions of 28 USC, Section 2283.

Constitutional Provisions

FIFTH AMENDMENT: CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty or property, without due process of law;*

nor shall private property be taken for public use, without just compensation.

NINTH AMENDMENT: The enumeration in the Constitution, of certain rights, shall not be construed to deny or to disparage others retained by the people.

Statement of Case

On February 22, 1972, the Concerned Parents Association, Inc., et al, filed a declaratory judgment suit in the Chancery Court of Davidson County, Tennessee. Said action sought to have the rights of the plaintiffs declared as to the implementation, by the defendants named in said action, of the orders of the United States District Court for the Middle District of Tennessee, Nashville Division in the case of *Robert W. Kelley, et al v. Metropolitan County Board of Education,* 463 F.2d 732 (Sixth Cir. 1972). Said complaint had asked for injunctive relief by both temporary and permanent injunction as follows:

"The plaintiffs aver that they are entitled to a temporary injunction prohibiting the defendants, or any of them, from requiring any student to attend any particular school against the will of such student or his parents, or assigning any student to any school so far from his home that he must spend more than half an hour in transit and awaiting transportation under normal operating conditions, or assigning more pupils to distant schools than can be transported with present buses properly maintained with adequate reserves for breakdowns in normal school hours, and further prohibiting the defendants from withholding from pupils and parents full and truthful information with respect to violence and threats thereof at any school to the end that parents and pupils may be able to make an informed judgment for themselves whether they are willing to incur the risks of complying with assignment to such schools.

They further aver that upon the final hearing they are entitled to have such injunction made permanent with additional provisions prohibiting the defendants from misusing educational funds to support excessive busing, from making any pupil assignments on any basis other than educational criteria developed upon a sound development of facts by qualified specialists, and from making any assignments or imposing or withholding any discipline on racial grounds, together with such other provisions as may appear necessary upon the hearing to protect the rights of the plaintiffs and members of their classes.

The plaintiffs aver that unless such injunctive relief is granted, they and each of them will be irreparably damaged because of deprivation of their constitutional rights and the denial of proper and timely educational opportunities for continuously growing pupils, and that in the absence of such injunctive relief the risk of death or serious bodily harm or disease will continue to increase and may actually be realized before a final resolution of the issues herein.

They further aver that they have no plain, speedy or adequate remedy at law or otherwise for the wrongs complained of herein."

The temporary injunction was never sought by the plaintiffs to that action nor was there ever a hearing before the Chancery Court in regard thereto.

There was no responsive pleading filed by the defendants to Chancery Court case although much time and leniency was given said defendants to do so. Finally, in an effort to require said defendants to take some action so as to allow the case to proceed, the plaintiffs filed a motion for default judgment. This motion was heard at 9:00 a.m. on April 7, 1972. The Court granted the motion for default judgment because the defendants had been served more than thirty (30) days from the date

of the hearing of the motion but had not filed a responsive pleading (46A and 47A)[1]. However the order granting a default judgment was not entered (48A).

On the same day, April 7, 1972, the defendants in the Chancery Court case, filed a new suit styled, "Motion for Temporary Restraining Order" before the United States District Court, Middle District of Tennessee, Nashville Division (4A).

On the same date, without notice, Honorable L. Clure Morton, Judge of the United States District Court, Middle District of Tennessee, issued a temporary restraining order against the Appellants and on his own motion made the Appellant Concerned Parents Association, Inc. et al a party defendant. Said order set the cause for hearing on the 14th day of April, 1972, at 8:00 a.m. (25A).

To this order, the Appellants Concerned Parents Association et al. filed a motion to dismiss (34A).

This motion was denied and a permanent injunction issued against Appellants Concerned Parents Association et al. as follows:

"Therefore, the named defendants to this action and any and all attorneys whom they may employ are hereby permanently enjoined from filing any additional documents, papers, requests, injunctions, pleadings, or making any oral requests in the cause styled *The C.P.A., Inc. et al vs. Elbert D. Brooks, Director of Nashville, Metropolitan Schools, et al,* No. A-1298, in the Chancery Court of Davidson County, Tennessee. In particular, the defendants and each of them and any and all attorneys whom they may employ are specifically enjoined from seeking any injunction or restraining order which has the effect of modifying or attacking the orders entered in the United States

[1] Reference to page numbers apply to the Appendix heretofore filed before the United States Court of Appeals for the Sixth Circuit.

District Court for the Middle District of Tennessee in the case entitled *Robert W. Kelley, et al vs. Metropolitan County Board of Education.* Furthermore, the defendants and each of them and any and all attorneys whom they may employ are enjoined from taking any action of any kind or character which interferes with the implementation of the orders of the United States District Court for the Middle District of Tennessee in the case of *Robert W. Kelley, et al vs. Metropolitan County Board of Education.*"

At the hearing on April 14, 1972, there was read into the record, by the Honorable L. Clure Morton, a previously prepared document setting forth facts of which the Court would take judicial knowledge (36A).

The Court then asked counsel for the Concerned Parents Association et al if there was any question that the attached complaint (meaning the complaint filed in Chancery Court) was a true and correct copy. To this question, counsel replied, "No questions, Your Honor". (44A)

There is nothing in the record that says that Petitioner Concerned Parents Association et al agreed with the findings of the Court as alleged on Page 5 of Respondent Brook's brief.

It was contended by respondents that the District Court's jurisdiction is based upon Title 28, Section 2283 of USCA. This is denied by petitioner.

Argument

Certiorari should be granted in this case because the Court of Appeals failed to address itself to the issues presented it and further, failed to apply the existing law to said issues. Said issue and the purpose of this petition by this petitioner is whether the constitutional rights of petitioner were violated when the

United States District Court enjoined them from pursuing a proceeding in State Court in which they sought among other things, discovery of facts, declaration of their rights and State Court protection of their children's health, safety and welfare.

When Respondent Brooks filed his "Motion for Temporary Injunction", he did not make the attorney for petitioner Jack Kershaw, a party defendant in the caption of the motion. It was proper that the motion be styled as it was, and that the petitioner, Kershaw, remain in the position of attorney for the respondents. However, the first statement of the order (25A) granting a temporary injunction issued by the District Court immediately stripped the said petitioner's attorney, Jack Kershaw, of any authority to represent his clients in the hearing on the "Motion for Temporary Injunction" or any other matter involving the issues raised in that cause.

It is insisted by these petitioners that the reason their attorney, Jack Kershaw, was made a party defendant to the "motion" therefore, could only be to remove him automatically from any position of representation of his clients. This was done without an opportunity to defend such action and without his consent and was in violation of their constitutional rights to have counsel of their free choice represent them.

The case of *In re: Baxter*, Fed., Cap. No. 1, 118 5 AM Law Reg N.S., 159, note says:

> "The right of an attorney to practice his profession is his property . . . . "

The District Court has denied the petitioners of their property rights without due process by sumarily making their attorney a party litigant and thereby stripping him of his ability to represent his client without fear of contempt from the Court.

Thus, petitioner has been deprived of this property without

due process of law in violation of the Fifth Amendment of the United States Constitution.

Regardless of what effect or to what extent the injunction has upon their attorney, Jack Kershaw, because he was made a party litigant, he no longer can lawfully represent his clients. Whether the effect is great or small, significant or insignificant, the effect is unnecessary, illegal, capricious and indicative of an attitude toward him that is prejudicial.

The second basic constitutional issue is whether or not the petitioners had the right to file such declaratory judgment suit in the State Court or whether as a matter of law they were bound by the Feder District Court's decision in a desegregation case involving the Respondent Elbert Brooks et al, such case more properly known as *Robert W. Kelley et al vs. Metropolitan County Board of Education* (1972). In summary, did the Federal District Court violate the Ninth Amendment to the Constitution of the United States when it arbitrarily issued the restraining order preventing the petitioners from proceeding further with their equity lawsuit against the petitioners in their official capacities as mayor appointed members of the County school board.

It is respectfully insisted that the action of the United States District Court and the Court of Appeals in upholding such restraining order upon the petitioners is directly and immeasurably detrimental to our system of justice. If a Court on its own motion can restrain an attorney representing a party litigant by making said attorney a party litigant himself, we have destroyed forever the adversary system of justice. Such action by the Court forces attorneys into a predetermined mold designed by the Court and from which there is no escape.

Unless this Court grants the Writ of Certiorari as prayed for herein, this petitioner is cut off from exercising their property rights to select the attorney of their choice and to have a State

Court determine their mutual rights and remedies. Surely the time has not come that our Judicial System no longer will allow to be uttered that with which it may disagree. Surely this Court will not allow arbitrary and unnecessary power to be wielded by a lower Court that suppresses the opinion of parties' litigant and denies them the right to be represented by counsel of their choice. Surely we have not degenerated to the point that our Courts are closed to the public, or that citizens cannot seek redress for alleged wrongs committed against them in any Court of their choice having competent jurisdiction.. We must at all cost in order to maintain the law and order of this nation keep our Courts open and the lawyers practicing before those Courts free to represent the cause of their clients. When the day comes that such freedom is denied lawyers and this denial is supported by the Courts of this land, and particularly this Court, then, the freedom of this land, the greatness of its Judicial System we follow and the independence of the people we serve will cease.

One of the basic contentions of this petitioner is that the State Court case enjoined by the District Court was not at a point in fact or law which constituted an interference with the District Court's orders. The District Court could have accomplished everything it felt necessary to protect its orders without denying the petitioner his property right without due process, but the problem arose out of an expectancy that there would be State-Federal Court conflicts.

Therefore, the petitioners submit that the action of the United States District Court was designed to suppress the petitioner and to deny them counsel of their choice. The avoidance of Federal-State judicial conflicts has always been the policy of the United States, and the authorization given to a Federal District Court by 28 USC Section 2283 to enjoin State Court proceedings depends upon the existence of necessity to "affectuate its judgment". This power was carefully discussed in

Atlantic Coast Railroad Company vs. Brotherhood of Locomotive Engineers, 398 USC 281, 90 SCT 1739, and 26 L.Ed. 234 (1970); and in such the Supreme Court of the United States dealt with the precise question of whether a lower Federal District Court could of its own issue a restraining order upon a plaintiff who had proceeded in State Court in matters related to a case previously determined in the Federal District Court. After reviewing the history of the Judiciary Act of 1789 and decisions interpreting such act, the Court made the following statement which petitioners insist is fundamental to Federal-State jurisprudence, which statement is as follows:

> "First, a Federal Court does not have inherent power to ignore the limitations of *2283 and to enjoin State Court proceedings merely because those proceedings interfere with a protected Federal right or invade an area preempted by Federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the Federal Court itself has jurisdiction over the controversy or whether it is ousted from jurisdiction for the same reason that the State Court is. This conclusion is required because Congress itself set forth the only exceptions to this statute, and those exceptions do not include this situation . . . . . Nor was an injunction necessary because the State Court may have taken action which the Federal Court was certain was improper under the Jacksonville Terminal decision. Again, lower Federal Courts possess no power whatever to sit in direct review of State Court decisions. If the Union was adversely effected by the State Court's decision, it was free to seek vindication of its federal right in the Florida Appellate Courts and ultimately, if necessary, in this Court. Similarly, if because of the Florida Circuit Court's action, the Union faced the threat of immediate, irreparable injuries sufficient to jsutify an injunction under usable, equitable principles, it was un-

doubtedly free to seek such relief from the Florida Appellate Courts and might possibly in certain emergency circumstances seek such relief from this Court as well. Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in State Court proceedings, and that border of jurisdiction allows this Court correspondingly broader authority to issue injunctions necessary in aid of its jurisdiction."

By the explicit terms of the Constitution of the State of Tennessee, Article I, Section II, such language, therein can be found that the government being instituted for the common benefit, the doctrine of nonresistance against arbitrary power anad oppression is absurd, slavish and destructive of the good and happiness of mankind. It, therefore, should be abundantly clear that the right ofthe petitioners, Concerned Parents Association et al to file complaints in the Courts of the State of Tennessee is an absolute right and any power which seeks to deny these citizens of the United States of these rights is committing an act which is violative of the constitutional rights of such citizens above mentioned. To be more specific, petitioners, Concerned Parents Association et al, would cite to the Court that under the Constitution of the State of Tennessee, Article I, Section XVII, the Courts of the State of Tennessee shall be open and every man for injury done in him in his lands, good, persons or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the State in such manner and in such Courts as the legislature may by law direct (see *Bledsoe v. Wright,* Tenn. 371, 1961; also *Preston v. Duncan,* 148 SW 229, Tenn. 106 (1912). Another proposition of law in support of the petitioners' Petition for Certiorari is that the Federal District judge erred in enjoining these petitioners from presenting their greivances in a Court of

competent jurisdiction as the matter in controversy was not a federal question. Itwas simply a suit to discover information being held from the citizens of Davidson County by a State authority, the Metropolitan Board of Education, and to determine the rights and remedies of innocent children, both black and white, as well as citizens and taxpayers who were being asked to pay additional monies for school funds allegedly needed by school authorities to carry on such mass "busing for racial balance". Such suit in equity brought by these petitioners was filed in the Chancery Court of Davidson County, Tennessee, by Davidson County, Tennessee, children and citizens, both black and white, all being residents of Davidson County, Tennessee, at the time of the filing of such suit. No federal question was raised by the defendant in that proceeding, the respondent herein. No answer admitting or denying the facts or denying the sworn affidavits filed on behalf of the petitioners in such Chancery Court complaint was filed by the respondents, Elbert Brooks et al, in that cause. It is and was insisted by the petitioners that the Chancery Court of Davidson County had jurisdiction to hear such case involving these infant children as well as the subject matter being a declaration of their rights as as citizens and parents of these children in regard to the children's health, safety and welfare. Such jurisdiction is conferred by *Tennessee Code Annotated,* Title 16, Section 610, which states that the Chancery Court has jurisdiction of the person and estate of infants. One of the leading authorities in regard to the practice and procedure of Chancery Court, *Gibson's Suits in Chancery,* Section 44, Page 55, enunciates the following principle of equity:

> "It is the peculiar province of Courts in equity to give all needed and appropriate relief in the case of infants whose rights have been sacrificed. The Chancery Court acts as guardian for all persons under disability."

See also *Ridley v. Haliday* (1901) 106 Tenn. 697 and *Cody v. Roane* (1900) 105 Tenn 515.

The final contention of the petitioners relates to the question of law as to whether or not these petitioners as infants and citizens of Davidson County, Tennessee, were bound by the judgment in the *Kelley v. Metropolitan Board of Education* case (Supra), or if such case relates and is binding upon only those defendants who were actual parties to such proceeding. It must be emphasized at this point that the *Kelley vs. Metropolitan Board of Education* case (Supra) involved a suit brought by Negro parents and children against the Metropolitan Government of Nashville and Davidson County Board of Education and not those citizens, parents or children who were the plaintiffs in the Chancery Court enjoined by the lower District Court. They were never made parties to such desegregation case. This was acknowledged by the trial judge in his response to the attorney representing these petitioners statement that it was the position of his clients that they were never parties to the Kelley case. The trial judge acknowledged such fact but apparently forgot to mention such in his memorandum opinion and order. These petitioners assert that due process of law requires that before a person, or corporation, is bound by an injunction or other Court order, it first must be served with process and be made a party to a class who is before a Court of competent jurisdiction. In the *Kelley case* (Supra), this was never done. It is fundamental that to be bound by such a decree which effects over 50,000 school children, their parents, relatives and friends, that these persons through their parents and attorneys be afforded the right to present their greivance in a Court of equity in the County in which they are a resident, which Court of equity can, if the facts and law so dictate, protect such complainants against actionable wrongs against their property or their persons. It should be noted at this juncture that all of the cases cited by the respondents to the trial judge involved

situations where the particular party who proceeded in State Court had an opportunity to be heard in the Federal Court which had acquired jurisdiction over that party by class action or personal service of process. In the instant case, no parent, child, or other party plaintiff to the State Court case was ever a party to the class or was personally served with process in the original desegregation case itself, nor were they parties to any suit involving the Metropolitan school system or the government of Davidson County, Tennessee. They represent a large class not heretofore represented before the Federal Court in such desegregation case (see Rule 23 (B) Class Actions, *Federal Rules of Civil Procedure;* also see *Shane v. Northwest Industries, Inc.*, 49 FRD 46, 3B *Moore's Federal Practice*, Paragraph 23, Section 10-1, Page 2762; also *Millekin v. Meyer*, 311 US 457 (1940); *Grannis v. Ordean*, 234 US 385 (1914); and *Roller v. Holly*, 176 US 398 (1900), as authority for the above proposition of law).

As was stated in *Cottman Company v. Daily*, 94 F.2d 85 (Fourth Cir. 1958), not being parties they are not bound by *Kelley* (Supra). *Cottman* (Supra) states:

> "Where a judgment is entered by a Court of competent jurisdiction with respect to a matter in controversy before it, such judgment is *binding upon the parties*, and may not be received by another Court of coordinate jurisdiction under the guise of exercising the injunctive power."

(emphasis ours)

Wherefore, and in view of the above, the petitioners, Concerned Parents Association et al, assert that they have not been heard in a Court of competent jurisdiction concerning matters of supreme importance to them and involving basic constitutional rights and they insist that they have a right to be heard and ask for their day in the Chancery Court of Davidson

County, Tennessee, the proper forum for the proceeding to which they are a party, and that any action on the part of the Federal Court to prevent them from doing so is a direct denial of their rights under the Ninth Amendment of the Constitution of the United States as well as the previous authorities cited herein.

In the words of Rule 19 of this Court, the petitioners charge that the United States District Court for the Middle District of Tennessee at Nashville and the United States Circuit

> "have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower Court, as to call for this Court's power of supervision."

Conclusion

Wherefore, these petitioners pray that for the reasons set forth above, certiorari should be granted.

Respectfully submitted,

James Patrick Nichol
Ingraham, Nichol, Young & Corbett
1720 Parkway Towers
Nashville, Tennessee

Attorney for the Petitioners,
Concerned Parents Association et al